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### Pleading and Practice--Right of Corporation to Appear in Action in Person--Section 236 of the N.Y. Civil Practice Act (Mortgage Commission v. Great Neck Improvement Co., 162 Misc. 416 (1937))

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owe only the duty of exercising ordinary or reasonable care.<sup>4</sup> Such care includes the duty to see that the premises are in a reasonably safe condition<sup>5</sup> and to provide an adequate number of attendants.<sup>6</sup>

The fact that an emergency arises does not relieve the amusement owner of the obligation to exercise ordinary care,<sup>7</sup> but it is a circumstance to be considered in determining what is ordinary care.<sup>8</sup> Emergencies have made the rule of ordinary care, in its application, less stringent,<sup>9</sup> for men, in times of great stress, are not held to the strict responsibility of those who act deliberately;<sup>10</sup> "nor will they be penalized because they do not do what, in the light of subsequent events, or in theory, would have avoided the accident".<sup>11</sup> The mere non-performance of an act which, in the light of an emergency, seems desirable, does not necessarily show a legal duty to perform it, or render the person failing to do so guilty of negligence.<sup>12</sup> Of course, where the crisis or strait is brought about by the defendant's own negligence, these rules do not apply.<sup>13</sup>

Although exigency may modify the duty of ordinary care it should be left to the jury to determine what it should be in any given situation.<sup>14</sup> The question of negligence is for the jury and it should not be invaded by the court except in the clearest cases.<sup>15</sup>

A. P. W.

PLEADING AND PRACTICE—RIGHT OF CORPORATION TO APPEAR IN ACTION IN PERSON—SECTION 236 OF THE N. Y. CIVIL PRACTICE ACT.—The Mortgage Commission brought an action to foreclose a

<sup>4</sup> O'Toole v. South Island Park Ass'n, 206 App. Div. 31, 200 N. Y. Supp. 502 (4th Dept. 1923); Dunning v. Jacobs, 15 Misc. 85, 36 N. Y. Supp. 453 (1895).

<sup>5</sup> Rienzi v. Tilyou, 252 N. Y. 97, 169 N. E. 101 (1929).

<sup>6</sup> Griswold v. Ringling, 221 N. Y. 705, 117 N. E. 1069 (1917) *semble*; Ward v. F. R. A. Operating Co., 265 N. Y. 303, 129 N. E. 585 (1935) *semble*.

<sup>7</sup> Mississippi C. R. R. v. Aultman, 173 Miss. 672, 160 So. 737 (1936).

<sup>8</sup> National Life Ins. Co. v. McKenna, 226 Fed. 165 (C. C. A. 8th, 1915).

<sup>9</sup> Hull v. Taine, 173 So. 701 (Fla. App. 1937); Louisville & N. R. R. v. Wright, 193 Ky. 59, 235 S. W. 1 (1921); Fernald v. French, 121 Me. 4, 115 Atl. 420 (1921); Verney v. Springfield St. Ry., 210 Mass. 63, 96 N. E. 79 (1915).

<sup>10</sup> Hartley v. Lasseter, 96 Wash. 407, 165 Pac. 106 (1917).

<sup>11</sup> *Ibid.*

<sup>12</sup> Cf. Draper v. Delaware & H. Canal Co., 118 N. Y. 118, 23 N. E. 131 (1885).

<sup>13</sup> Caldwell v. Hughes, 18 Tenn. App. 355, 77 S. W. (2d) 117 (1935); Siegl v. Watson, 181 Wis. 619, 195 N. W. 867 (1923).

<sup>14</sup> O'Brien v. New York C. R. R., 185 App. Div. 867, 174 N. Y. Supp. 116 (1st Dept. 1919).

<sup>15</sup> Moore v. Westervelt, 21 N. Y. 103 (1860); Rocky Mountain Fuel Co. v. Tucker, 72 Colo. 308, 211 Pac. 283 (1922); Reichle v. Philadelphia Rapid Transit Co., 241 Pa. 1, 88 Atl. 79 (1913).

mortgage on real property in which the defendant Great Neck Improvement Company, a domestic corporation, served a notice of appearance and an answer containing an affirmative defense subscribed in its corporate name, by its president, as appearing in person. The plaintiffs now move for an order striking out the answer upon the sole ground that a corporation cannot so appear, but must appear by a duly licensed attorney, invoking Section 236 of the Civil Practice Act<sup>1</sup> which deals with appearance in person. The defendants contend that Article VIII, Section 3 of the New York State Constitution<sup>2</sup> grants to a corporation the same rights to sue and be sued as natural persons. *Held*, corporations are not within the contemplation of the provisions of Section 236 of the Civil Practice Act which deals with appearance in person of only natural persons. *Mortgage Commission v. Great Neck Improvement Co.*, 162 Misc. 416, 295 N. Y. Supp. 107 (1937).

The common law required that every suitor must, except by special license of the king's letters patent, appear in person to prosecute or defend his suit.<sup>3</sup> Corporations were part of the sovereign and could neither sue nor be sued.<sup>4</sup> Later, textwriters report, corporations aggregate were allowed to be party plaintiffs or defendants but only through attorneys.<sup>5</sup> The New York State Constitution, Article VIII, Section 3, made no mention of this distinction of appearance by a corporation or a person, but merely stated, "sue and be sued upon an equal footing with natural persons." In the instant case Justice Hallinan declared that this provision gives to corporations the same protection and subjects them to the same liability which would involve an individual under the same circumstances,<sup>6</sup> but in no way bears upon the Civil Practice Act section which was enacted subsequently<sup>7</sup> and as interpreted relates solely to natural persons.

In other jurisdictions, in which statutes similar to Section 236 of the Civil Practice Act were involved, the courts have held that a corporation may not act in legal matters through agents or representatives, but only through licensed attorneys.<sup>8</sup> Also, the Supreme

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<sup>1</sup> N. Y. CIV. PRAC. ACT § 236: "A party who is of full age may prosecute or defend a civil action in person or by attorney unless he has been judicially declared to be incompetent to manage his own affairs \* \* \*."

<sup>2</sup> N. Y. STATE CONST. art. VIII, § 3: " \* \* \* all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons." Blackstone, in his commentaries, enumerated as one of the attributes of a corporation, the power to sue or be sued in the corporate name. 1 BL. COMM. 475.

<sup>3</sup> (1937) 37 COL. L. REV. 313.

<sup>4</sup> 1 CO. LITT. (1st Am. ed.) § 90, B66.

<sup>5</sup> 1 CHITTY, PLEADING (16th Am. ed. 1844) 551; COMYN'S DIGEST, PLEADER 2, B2.

<sup>6</sup> *Williams v. Village of Port Chester*, 97 App. Div. 84, 89 N. Y. Supp. 671 (2d Dept. 1904), *aff'd*, 183 N. Y. 550, 76 N. E. 1116 (1906).

<sup>7</sup> Instant case at p. 418.

<sup>8</sup> *Mullin-Johnson Co. v. Penn. Mutual Life Ins. Co.*, 9 F. Supp. 175 (D. C. Cal. 1934); *Nightingale v. Oregon Cent. Ry.*, 18 Fed. Cas. 239, No. 10,264 (C. C. Ore. 1873); *Bennie v. Triangle Ranch Co.*, 73 Colo. 586, 216 Pac.

Court of the United States has twice stated that a corporation must appear by counsel.<sup>9</sup> The reason advanced is that these statutes, to some degree, act as a stop-gap upon the ever-growing invasion of corporations and laymen into the field of professional activities. Such an encroachment leads inevitably to the lowering of the zealously guarded standards of the legal profession.<sup>10</sup> The judges in construing statutes of procedure to apply only to natural persons, apparently, have innermost in their minds the prohibition of corporations from practicing law for others.<sup>11</sup> It is settled in law that this doctrine (prohibition of corporate practice of law) is based upon the policy that corporate practice destroys the confidential and personal relationship of practitioner and client.<sup>12</sup> This illegality of practice is not alone statutory. Statutes prohibiting corporate practice have been held to be declaratory of the already existing law.<sup>13</sup> However, when corporations do not encroach upon the legal field, but defend or prosecute actions which have arisen, in the first instance, solely with them, this doctrine of prohibition should not be set up. Any contention that a corporation is functionally incapable of defending an action in person is untenable. The officers of the corporation are the corporation itself; their intent is regarded the intent of the corporation.<sup>14</sup>

In the earlier case of *Sellent-Repent Corp. v. Queens Boro Gas & Elec. Co.*,<sup>15</sup> the court allowed a corporation to appear in person and held that "a wide difference exists between acting for oneself by an inherent faculty, and the employment of another person to act for and in one's stead. When a corporation does not go outside its own corporate machinery in the performance of a corporate act, it is acting

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718 (1923); *Nixon, Ellison & Co. v. Southwestern Ins. Co.*, 47 Ill. 444 (1868); *Nispel v. Western Union Ry.*, 64 Ill. 311 (1872); *Union Pacific Ry. v. Horney*, 5 Kan. 340 (1870); *Cobb v. Judge of Superior Court*, 43 Mich. 289, 5 N. W. 309 (1880); *Cary & Co. v. Satterlee & Co.*, 166 Minn. 507, 208 N. W. 408 (1926); *In re Richards*, 333 Mo. 907, 63 S. W. (2d) 672 (1933); *N. J. Photo Engrav. Co. v. Schonert & Sons, Inc.*, 95 N. J. Eq. 12, 122 Atl. 307 (1923).  
<sup>9</sup> *Wheat*, 738, 6 L. ed. 204 (U. S. 1824); 14 Pet. 60, 10 L. ed. 354 (U. S. 1840).

<sup>10</sup> *Hicks and Katz, The Practice of Law by Laymen and Lay Agencies* (1931) 41 YALE L. J. 72.

<sup>11</sup> CONN. GEN. STAT. (1933) § 5345; ILL. REV. STAT. ANN. (1933) c. 32, §§ 411, 412; OHIO GEN. CODE (Page, 1926) § 1076; PA. STAT. ANN. (1936) tit. 17, § 1608; *State v. Merchants' Protective Corp.*, 105 Wash. 12, 177 Pac. 694 (1919); *People v. Merchants' Protective Corp.*, 189 Cal. 531, 209 Pac. 363 (1922). Mr. Justice Brandeis predicted years ago, that the individual would be engulfed by the corporation unless remedial steps promptly were taken. FRAENKEL, THE CURSE OF BIGNESS, MISCELLANEOUS PAPERS OF MR. JUSTICE BRANDEIS (1935).

<sup>12</sup> *In Matter of Co-Operative Law Co.*, 198 N. Y. 479, 92 N. E. 15 (1910); *Wormser, Corporations and the Practice of Law* (1936) 5 FORDHAM L. REV. 207.

<sup>13</sup> *Meisel & Co. v. Nat. Jewelers Board of Trade*, 90 Misc. 19, 152 N. Y. Supp. 913 (1915).

<sup>14</sup> STEVENS, CORPORATIONS (Horn Book Series 1936) 319; *People v. Canadian Fur Trappers Corp.*, 248 N. Y. 159, 161 N. E. 455 (1927).

<sup>15</sup> 160 Misc. 920, 290 N. Y. Supp. 887 (1936).

in person and upon an equal footing with a natural person, including the right to sue in person.”<sup>16</sup> The corporation when acting through its duly constituted officers is acting in person as much as a natural person who himself performs acts on his own behalf,<sup>17</sup> and to deny the corporation the right to appear in our courts to prosecute and defend its own legitimate actions is to unjustly penalize the corporation.

H. K.

**SALES—IMPLIED WARRANTY—WORK, LABOR AND SERVICES.**—Defendant employed plaintiff, a woman, as a domestic in his household. As compensation he agreed to pay her a sum of money per month and to furnish her with food and lodging. Defendant accordingly purchased for plaintiff’s consumption a quantity of ham and pork which plaintiff prepared and ate, following which she became ill allegedly due to an infection with trichinae of the food. Plaintiff’s complaint was based on the theory of a sale of the food by defendant to her with a consequent implied warranty that such food was reasonably fit for consumption and contending that the consideration for such sale consisted in the services rendered by plaintiff to defendant. Plaintiff failed to allege negligence in her complaint. *Held*, complaint insufficient to state a cause of action since transaction between parties did not constitute a sale. *Haag v. Klee*, 162 Misc. 250, 293 N. Y. Supp. 266 (1936).

It is rare that any change of property for a consideration takes place today without some warranty as to quality or utility of the commodity sold. This warranty may be either express or implied.<sup>1</sup> Under both the common law<sup>2</sup> and by statute<sup>3</sup> upon the sale of provisions for human consumption there arises an implied warranty of wholesomeness and fitness<sup>4</sup> because of the reliance by the vendee upon the vendor’s skill and judgment in the selection of goods that

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<sup>16</sup> *Ibid*.

<sup>17</sup> 10th St. & 5th, Inc. v. Naughton, 163 Misc. 437, 296 N. Y. Supp. 952 (1937), plaintiff, landlord-domestic corporation, instituted summary proceedings without counsel. *Contra*: Finox Realty Corp. v. Lippman, 163 Misc. 870, 296 N. Y. Supp. 945 (1937).

<sup>1</sup> WHITNEY, SALES (2d ed. 1934) § 166.

<sup>2</sup> Van Bracklin v. Fonda, 12 Johns. 468 (N. Y. 1815); Moses v. Mead, 5 Denio 617 (N. Y. 1846); Divine v. McCormick, 50 Barb. 116 (1867).

<sup>3</sup> N. Y. PERS. PROP. LAW § 96.

<sup>4</sup> WHITNEY, SALES (2d ed. 1934) § 173.